Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1828

In the Supreme Court of the United States

OCTOBER TERM, 1976

FELIX POLLUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1828

FELIX POLLUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On July 8, 1949, petitioner was discharged by the Internal Revenue Service from employment as a deputy collector for solicitation of a bribe and acceptance of a gratuity. He did not take a timely appeal to the Civil Service Commission. On March 3, 1975, nearly twenty-six years later, petitioner instituted this action in the Court of Claims. The Court of Claims held that petitioner's action was barred by the six-year period of limitations prescribed by 28 U.S.C. 2501 (Pet. App. 13-14).

On May 15, 1974, petitioner's Congressman and his son had met with the Director of the Personnel Division of the Internal Revenue Service to describe alleged new evidence and to request reconsideration of the dismissal. Shortly thereafter, they delivered to the Service a package containing that evidence. The Service then submitted the case file, the evidence, and a brief for petitioner to an experienced examiner of "conduct" cases (Pet. App. 9).

The examiner concluded that the 1949 dismissal had been justified (Pet. App. 10-12). On September 24, 1974, the Director transmitted this conclusion to the Congressman and advised that he agreed with it (Pet. App. 9-12).[1]

Petitioner contends that the meeting of May 15, 1974, was petitioner's initial administrative hearing concerning his discharge, that the Director's letter of September 24, 1974, was the final administrative decision, and that his cause of action for monetary compensation in the Court of Claims did not accrue until that decision. However, a cause of action for wrongful discharge from a non-probationary civil service position accrues at the time of dismissal, unless the employee takes a timely administrative appeal or presents evidence legally sufficient to excuse his failure to do so. *Group* v. *United States*, 165 Ct. Cl. 612, 615-616; *Friedman* v. *United States*, 310 F. 2d 381, 386-387 (Ct. Cl.); *Middleman* v. *United States*, 91 Ct. Cl. 306. Petitioner had not pursued a timely administrative appeal to the Civil Service Commission or presented evidence justifying his failure to exhaust his administrative remedies. Petitioner's failure to pursue available remedies did not postpone the accrual of his cause of action or toll the statute of limitations for monetary relief in the Court of Claims. Cf. *Soriano* v. *United States*, 352 U.S. 270. Nor, contrary to petitioner's contention, does informal discretionary reconsideration by

[1]The Director stated (Pet. App. 12):

> Since I have become Director, Personnel Division, I have had a thorough review made of this case on two occasions, including the present one directed at the "new evidence" and its possible impact on the removal action. As a result of these reviews, I have found no factual or evidentiary basis on which to question the previous conclusion, reached by a host of Service and Department level officials who have found the removal proper over the past twenty-five years.

the agency and reiteration of its prior decision revive the cause of action that has been extinguished by expiration of the limitations period.[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

[2]Petitioner incorrectly suggests (Pet. 4) that *Friedman* v. *United States*, *supra*, and *Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.), are to the contrary. In those cases, the court held that a cause of action for military disability retirement pay does not accrue until the disability claim is denied administratively. Claims for such retirement pay are governed by a statutory scheme that is designed to provide compensation for service-connected disabilities which may be unknown to the serviceman for years after his separation. To effectuate this scheme, the cause of action for retirement pay has been construed as arising upon the final determination of the service board which initially passes upon the disability claim, after the claimant has brought that claim to the agency's attention. In contrast, since the cause for dismissal from the civil service must be clearly set forth at the time (5 U.S.C. (1946 ed.) 652(a); cf. 5 U.S.C. 7501), the cause of action arises at the time of dismissal. Cf. *Soriano* v. *United States*, *supra*, 352 U.S. at 274-275; *Friedman* v. *United States*, *supra*.